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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 398

HARRY F. MURPHY AND EARL J. BOUGHAN, TRUSTEES; MIRIAM HORN KELLEY, A WIDOW; MURIEL KELLEY RISSER, JOINED PRO FORMA BY HER HUSBAND, FRED P. RISSER; EVELYN TAYLOR KELLEY OWEN, JOINED PRO FORMA BY HER HUSBAND, ROBERT B. OWEN; JOHN EDGAR KELLEY, A MINOR, BY HIS NEXT FRIEND, ROBERT B. OWEN; AND EDNA D. KELLEY, A WIDOW,

vs. *Petitioners,*

MAY KELLEY SCHNEIDER, A WIDOW,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OSCAR D. MCCOLLUM,
1337 Rialto Building,
Kansas City, Missouri;
ROY W. CRIMM,
807 Midland Building,
Kansas City, Missouri;
STONE AND STONE,
712 Barfield Building,
Amarillo, Texas;
Attorneys for Petitioners.

D. H. CULTON,
611-618 Barfield Building,
Amarillo, Texas,
Counsel for Petitioners.

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The holding of the Court of Appeals for the Fifth Circuit that May Kelley Schneider conveyed her estate in the land in controversy by an oral acceptance of the deed from Charles H. Henderson purporting to convey all the land to Arthur B. Kelley and May Kelley Schneider for their joint lives with remainder to the survivor is in conflict with the law of Texas as enacted by Article 1288, revised Civil Statutes of the State of Texas, Revision of 1925, reading, in part:

"No estate of inheritance or freehold, . . ., in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same . . .".

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SUPREME COURT OF THE UNITED STATES

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HARRY F. MURPHY AND EARL J. BOUGHAN, TRUSTEES; MIRIAM HORN KELLEY, A WIDOW; MURIEL KELLEY RISSER, JOINED PRO FORMA BY HER HUSBAND, FRED P. RISSER; EVELYN TAYLOR KELLEY OWEN, JOINED PRO FORMA BY HER HUSBAND, ROBERT B. OWEN; JOHN EDGAR KELLEY, A MINOR, BY HIS NEXT FRIEND, ROBERT B. OWEN; AND EDNA D. KELLEY, A WIDOW,

vs. *Petitioners,*

MAY KELLEY SCHNEIDER, A WIDOW,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit in Cause No. 12951 on the docket of that Court.

Questions Presented

1

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT MAY KELLEY SCHNEIDER CONVEYED HER ESTATE IN THE LAND IN CONTROVERSY BY AN ORAL ACCEPTANCE OF THE DEED FROM CHARLES H. HENDERSON PURPORTED TO CONVEY ALL THE LAND TO ARTHUR B. KELLEY AND MAY KELLEY SCHNEIDER FOR THEIR JOINT LIVES WITH REMAINDER TO THE SURVIVOR IS IN CONFLICT WITH THE LAW OF TEXAS AS ENACTED BY ARTICLE 1288, REVISED CIVIL STATUTES OF THE STATE OF TEXAS, REVISED OF 1925, READING, IN PART:

> "NO ESTATE OF INHERITANCE OR FREEHOLD, . . . IN LANDS AND TENEMENTS, SHALL BE CONVEYED FROM ONE TO ANOTHER, UNLESS THE CONVEYANCE BE DECLARED BY AN INSTRUMENT IN WRITING, SUBSCRIBED AND DELIVERED BY THE PARTY DISPOSING OF THE SAME, . . ."

2

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE ORAL ACCEPTANCE OF THE HENDERSON DEED WAS "IN LEGAL EFFECT THE SAME AS AN EXECUTION THEREOF" BY MAY KELLEY SCHNEIDER IS IN CONFLICT WITH THE LAW OF TEXAS AS DECLARED BY THE APPLICABLE LOCAL DECISIONS.

3

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE EQUITABLE TITLE OF ARTHUR B. KELLEY IN THE LAND PASSED BY VIRTUE OF THE HENDERSON DEEDS IS IN CONFLICT WITH THE LAW OF TEXAS AS DECLARED BY THE APPLICABLE LOCAL DECISIONS THAT A CONVEYANCE NOT INTENDED AS A GIFT, FOR WHICH THERE WAS NO CONSIDERATION, DOES NOT PASS EQUITABLE TITLE.

II

Reasons Relied On for Allowance of the Writ

In each of the Questions Presented the Court of Appeals for the Fifth Circuit has decided an important question of

local law in a way to conflict with applicable local decisions and statutes, precedents, and long settled Rules of Property of long standing in the State of Texas relating to the title to land and the conveyance thereof.

In deciding the foregoing Questions the Court of Appeals for the Fifth Circuit has not applied the law of Texas by which it is bound. On the other hand, the Court has applied what might be the law of other states than Texas, thus depriving Petitioners of land in Texas which belongs to them under the law of Texas.

III

Basis of Jurisdiction

The jurisdiction of the Supreme Court is based on Title 28 U. S. C., Section 1254, Subdivision (1). The judgment of the United States Court of Appeals for the Fifth Circuit, which Petitioners herein seek to have reviewed, was rendered on August 5, 1950 (R. 903) and the order of the Court denying petition for rehearing was entered on September 20, 1950 (R. 947). The opinion of the Court of Appeals appears in the Record on Pages 893 to 909 and is reported in 183 F. (2d) 777.

IV

Statement of Matter Involved

This action was instituted by Petitioners in the District Court of the United States for the Northern District of Texas, Amarillo Division, against Respondent to impress a trust upon an aggregate of 53.667% undivided interest in 4,480 acres of land in Ochiltree County, Texas.

It is not controverted that on March 27, 1937, the legal title to the lands involved was vested in Arthur B. Kelley; an undivided one-sixth interest in the equitable title in his

brother, John M. Kelley; an undivided one third interest in the equitable title to his sister, May Kelley Schneider; and an undivided one half interest in the equitable title to himself, Arthur B. Kelley, all of such interests, both legal and equitable, having been created by and evidenced by instruments in writing.

The controlling Findings of Fact are:

Finding No. 10 (R. 114, 115) that Arthur B. Kelley, at all times material hereto, "knew and recognized that his brother John M. Kelley owned an undivided interest in the equitable title to the land and premises in controversy" and knew and recognized that his sister, May Kelley Schneider, likewise owned an undivided interest in the equitable title to the land in controversy;

Finding No. 11 (R. 115) that Respondent, May Kelley Schneider, knew that the lands were trust properties and knew that her brother, John M. Kelley, like herself, had acquired by devise from their mother and from their sister, Harriett, an equitable title to an undivided interest in the land;

Finding No. 12 (R. 115) reading:

> "On March 27, 1937, Arthur B. Kelley, then a single man, executed a warranty deed dated March 18, 1937, which in form purported to convey for a recited consideration of one dollar all of the land and premises in controversy to one Charles H. Henderson, a long time employee of Arthur B. Kelley and of his family. Upon the same date Charles H. Henderson executed a warranty deed dated March 19, 1937, which in form, for a recited consideration of one dollar, purported to convey all of the land and premises in controversy to Arthur B. Kelley and May Kelley Schneider for the period of their joint lives with remainder to the survivor, his or her heirs. These deeds were each filed for record in Ochiltree County, Texas, on April 3, 1937, and duly recorded in the Deed Records in such county.";

Finding No. 13 (R. 116) reading:

"No consideration whatever passed from Charles H. Henderson to Arthur B. Kelley for such deed to Charles H. Henderson.";

Finding No. 14 (R. 116) reading:

"No consideration whatever passed between May Kelley Schneider and Arthur B. Kelley to Charles H. Henderson for the deed from him to Arthur B. Kelley and May Kelley Schneider.";

Finding No. 15 (R. 116) reading:

"No consideration whatever passed from May Kelley Schneider to Arthur B. Kelley for any of the deeds above described.";

Findings Nos. 16 and 17 (R. 116) that no gift was intended in the Henderson deed transaction, and none made;

Finding No. 18 (R. 116) that the intent and purpose of Arthur B. Kelley in the Henderson deed transaction was to have two trustees for the land with right of survivorship;

Finding No. 25 (R. 117, 118) that Arthur B. Kelley died May 10, 1943; and

Finding No. 26 (R. 118) that after the death of Arthur B. Kelley, May Kelley Schneider claimed all of the land as her own.

Based upon the above controlling Findings the trial court concluded (Conclusions Nos. 6, 10 and 11, R. 123, 124) that the deeds referred to in Finding No. 11 (and herein as the Henderson deeds) passed no equitable title to the land and that by virtue of such deeds Arthur B. Kelley and May Kelley Schneider became vested with legal title only as joint tenants with right of survivorship as trustees for the owners of the equitable title as tenants in common, and entered a judgment accordingly.

The Circuit Court characterized the Findings of Fact of the trial court as "full and complete" (R. 899) and ex-

pressly stated that there was no occasion for determining whether, as facts, the Findings were clearly erroneous (R. 901). The Circuit Court did not set aside as determining the facts any of the Findings. As determining the facts of this controversy the Findings of Fact of the trial court stand.

The Court of Appeals, Fifth Circuit, held (R. 902): "The acceptance of this deed being in legal effect the same as an execution thereof, it likewise, as to May Kelley Schneider, evidenced a disposition of her equitable estate made, and to be made in the future, in accordance with the terms of the instrument"; that the Henderson deeds on their face thus evidenced a consideration moving from Respondent to Arthur B. Kelley in the form of the conveyance by her to Arthur B. Kelley of her interest in the land (R. 902); and (R. 902) "Therefore, the finding by the Court of no consideration,—is not legally material", so that the equitable title of Arthur B. Kelley was held to have passed under the Henderson deeds.

While the Henderson deeds on their face purported to convey all of the land in controversy, without any exception as to John M. Kelley's then interest therein, the Court of Appeals held that in law and under concession of Respondent made in the Court of Appeals (R. 897) one-sixth interest in the equitable title to the land rightfully belongs to the trustees of John M. Kelley, but that the devisees of Arthur B. Kelley, except Respondent, had no interest in the land, and reversed and remanded the judgment of the trial court with instructions to enter judgment declaring the ownership of the land as above set forth.

V

Prayer

WHEREFORE, Petitioners respectfully pray that writ of certiorari to the United States Court of Appeals for the Fifth Circuit be issued herein, and that this Honorable Court review the decision of the United States Court of Appeals for the Fifth Circuit rendered herein and finally reverse it and affirm the judgment of the trial court.

Respectfully submitted,

OSCAR D. MCCOLLUM,
1337 Rialto Building,
Kansas City, Missouri;
ROY W. CRIMM,
807 Midland Building,
Kansas City, Missouri;
STONE AND STONE,
712 Barfield Building,
Amarillo, Texas,
Attorneys for Petitioners.

D. H. CULTON,
611-618 Barfield Building,
Amarillo, Texas,
Counsel for Petitioners.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement

Petitioners here adopt the Statement of Matter Involved contained in the foregoing Petition for Writ of Certiorari.

Since the land in controversy is situated in Texas the title to it is determined exclusively by the law of Texas. *Colden* v. *Alexander* (S. Ct., Tex., 1943), 141 Tex. 134, 171 S. W. (2d) 328 at Pages 335 and 336, and authorities there cited.

On Question 1

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT MAY KELLEY SCHNEIDER CONVEYED HER ESTATE IN THE LAND IN CONTROVERSY BY AN ORAL ACCEPTANCE OF THE DEED FROM CHARLES H. HENDERSON PURPORTING TO CONVEY ALL THE LAND TO ARTHUR B. KELLEY AND MAY KELLEY SCHNEIDER FOR THEIR JOINT LIVES WITH REMAINDER TO THE SURVIVOR IS IN CONFLICT WITH THE LAW OF TEXAS AS ENACTED BY ARTICLE 1288, REVISED CIVIL STATUTES OF THE STATE OF TEXAS, REVISION OF 1925, READING, IN PART:

> "NO ESTATE OF INHERITANCE OR FREEHOLD, . . ., IN LANDS AND TENEMENTS, SHALL BE CONVEYED FROM ONE TO ANOTHER, UNLESS THE CONVEYANCE BE DECLARED BY AN INSTRUMENT IN WRITING, SUBSCRIBED AND DELIVERED BY THE PARTY DISPOSING OF THE SAME, . . .".

Under the decision of the Circuit Court herein a trustee may appropriate for himself trust property of the beneficiary without the beneficiary even knowing anything had happened. All the trustee would have to do would be to execute a deed conveying the trust land to the beneficiary and by exception contained in the deed except or reserve all

minerals and file the conveyance for record. The recording of the deed would raise the presumption that it was filed for record by the grantee and that the grantee accepted it (*McAnally* v. *Texas Co.* (S. Ct., Tex., 1934), 124 Tex. 196, 76 S. W. (2d) 997 at Page 1000). Under the decision of the Circuit Court the trustee would have acquired title to the mineral interest in the land. The burden would be upon the beneficiary in the trust to protect himself from the wrongful efforts of the trustee to acquire the trust property.

Article 1288 of the Revised Civil Statutes of Texas, Revision of 1925, reads, in full, as follows:

> "No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing."

This article is not a statute of frauds and forms no part of the Statute of Frauds of Texas. On the contrary, it is headed "Instrument of Conveyance" and is a part of Title 31 of the Revised Statutes of Texas, 1925 Revision, headed "Conveyances". It is a rule of substantive law prohibiting conveyances of land except by instrument in writing "subscribed and delivered by the party disposing of the same—". Under the article a conveyance not signed by the party disposing of the land is of no legal effect whatever. Upon the statute the court in *Southern Pine Lumber Co.* v. *Arnold* (T. C. A., Texas), 139 S. W. 917, said at Page 922:

> "The affixing of the signature to an instrument is a written assent to the contents, and that is what the statute intends shall be done when one conveys land, or creates an agency to convey."

May Kelley Schneider subscribed her name to nothing. She delivered nothing.

The Circuit Court for the Fifth Circuit, in deciding the question here considered, cited only the Texas case *Greene* v. *White*, 137 Tex. 561, 153 S. W. (2d) 575. The Supreme Court of Texas in *Greene* v. *White* expressly held (153 S. W. (2d) at Page 583) that the grantee in the deed involved there "*further became a party to the deed and contract by executing the vendor's lien notes given as purchase money*". In that case the grantee did give the "written assent to the contents" of the instrument that the "statute intends shall be done when one conveys land".

In *Greene* v. *White* the Supreme Court of Texas did not hold that the acceptance of a deed could operate to divest the grantee of an interest in land he had theretofore owned but held to the contrary that if, at the time of the execution and delivery of the deed there involved from Greene to Garrett, Garrett already owned the land "the deed was not effective to convey anything" and "did not have the effect of reserving minerals to Greene" and "could not operate * * * to reserve any kind of title to any timber estate thereon or to any mineral estate therein—" (153 S. W. (2d) at Page 587).

We respectfully submit that there are no Texas decisions holding that the acceptance of a deed divests the grantee of any previously owned interest in the land unless such acceptance is evidenced by an instrument in writing subscribed by the grantee.

The language of the court in *Bibby* v. *Bibby* (T. C. A., El Paso, 1938), 114 S. W. (2d) 284 at Page 286, is material to this controversy:

> "It is settled law that the manual delivery of a deed by the grantor will not operate to pass title unless such delivery was accompanied by an intention on the part of the grantor to invest the grantee with the title; and where the conveyance is based upon an onerous consideration, it is also necessary to show the grantee

> accepted the conveyance. The controlling question upon both of these issues is the intention of the parties. Taylor v. Sanford, 108 Tex. 340, 193 S. W. 661, 5 A. L. R. 1660; Hubbard v. Cox, 76 Tex. 239, 13 S. W. 170; Tyler B. & L. Ass'n v. Baird & Seales, Tex. Civ. App., 165 S. W. 542".

Thus, the acceptance of a correction deed describing different property from that described in an original deed establishes that the original deed was not delivered or accepted with the intent that the title pass to the property therein described. The grantee never owned it. By such a correction deed the grantor does not acquire an interest in the grantee's property.

If May Kelley Schneider intended to divest herself of an estate of inheritance in real property, which she knew was evidenced by instruments in writing, why was some written record of that intention not made? If Arthur B. Kelley, the trustee, had been the survivor and had asserted ownership to all of the land, how successful would he have been, upon the facts here, in asserting that May Kelley Schneider, the beneficiary, conveyed her interest in the land to him by accepting the deed from Henderson? A court would have rejected his claim with disgust and indignation. Clearly, the heirs or devisees of Mrs. Schneider could have recovered their interest in the trust property because Mrs. Schneider was not divested of any of her undivided interest in the equitable title to the land in controversy by virtue of the Henderson transaction. The Findings of Fact of the trial court that there was no consideration whatever passing between any of the parties to the Henderson deeds are, therefore, correct and legally material to this controversy.

On Question 2

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE ORAL ACCEPTANCE OF THE HENDERSON DEED WAS "IN LEGAL EFFECT THE SAME AS AN EXECUTION THEREOF" BY MAY KELLEY SCHNEIDER IS IN CONFLICT WITH THE LAW OF TEXAS AS DECLARED BY THE APPLICABLE LOCAL DECISIONS.

The Circuit Court cites no authority whatever for its holding that the acceptance of the Henderson deed was "in legal effect the same as an execution thereof".

Whatever the law of other states might be, under the laws of Texas the acceptance of an instrument in writing is not "in legal effect the same as an execution thereof". This was expressly decided by the Supreme Court of Texas in *Clegg* v. *Brannan,* 111 Tex. 367, 234 S. W. 1076, in the following language:

> "Plaintiff in error contends that he was bound by Brannan's written contract because he accepted it, and that it was accepted by them as binding upon both. *The acceptance of a contract in writing is not equivalent to signing it.*" (Emphasis ours.)

And in *American Nat. Ins. Co.* v. *Warnock,* 131 Tex. 457, 114 S. W. (2d) 1161, at Page 1164:

> "* * * in the case of an offer to buy or sell land, the acceptance must be in writing. * * *"

The Supreme Court of Texas in *Greene* v. *White, supra,* nowhere says or holds that the acceptance of a deed is in legal effect the same as an execution of it. In truth, the Supreme Court of Texas in *Greene* v. *White* expressly held that the grantee in the deed "became a party to the deed and contract by executing the vendor's lien notes given as purchase money".

Article 1288 of the Revised Statutes of Texas prohibits the conveyance of land except by instrument in writing

"subscribed and delivered by the party disposing of the same". There is no room in the statute for the equivalent of a signature. It is the signature itself which is required.

On Question 3

THE HOLDING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT THAT THE EQUITABLE TITLE OF ARTHUR B. KELLEY IN THE LAND PASSED BY VIRTUE OF THE HENDERSON DEEDS IS IN CONFLICT WITH THE LAW OF TEXAS AS DECLARED BY THE APPLICABLE LOCAL DECISIONS THAT A CONVEYANCE NOT INTENDED AS A GIFT, FOR WHICH THERE WAS NO CONSIDERATION, DOES NOT PASS EQUITABLE TITLE.

The recited consideration in the Henderson deeds is $1.00 cash (Finding 12, R. 115). The well-known, natural and universal manner in which two trustees hold property as trustees is with a right of survivorship. The Henderson deed, in which the right of survivorship is provided, is entirely consistent with the conclusion that Arthur B. Kelley and May Kelley Schneider held the legal title as trustees for the owners of the equitable title. The deed, therefore, does not define the interest of Arthur B. Kelley and May Kelley Schneider in the equitable title to the land any more than any other deed which is absolute upon its face. In *Fretelliere* v. *Hindes, et al.*, 57 Tex. 392, 393, the Supreme Court of Texas in 1882 confirmed the then already settled law in Texas by the following language:

> "That parol evidence is admissible to prove that a deed, absolute upon its face, was executed upon trusts not reduced to writing, and to prove a resulting trust, is not an open question in this court."

There being no contractual consideration recited in the Henderson deeds, it is well settled, under the law of Texas, that parol evidence is admissible to prove that no consideration passed for the deeds even though consideration is

recited therein and to prove facts which would raise a resulting trust. *Binford* v. *Snyder* (S. Ct., Tex., 1945), 144 Tex. 134, 189 S. W. (2d) 471; *Shannon* v. *Shannon* (T. C. A., Amarillo, 1950), 231 S. W. (2d) 986; 42 *Texas Jurisprudence,* P. 680, Trusts, Sec. 70.

The law of Texas is clearly stated in 42 *Texas Jurisprudence,* P. 643, Trusts, Sec. 40:

> "Conveyance Without Consideration.—Where, without receiving any consideration and with no intention to make a gift, A transfers property to B a trust results to A, although there is no proof that B agreed to hold the property in trust. If a promise to reconvey is proved, B will hold the property under an express trust; but the absence of any such agreement does not negative the conclusion of equity that a trust results from the mere fact that the property is conveyed without the passing of consideration and without any intention to make a gift."

The Supreme Court of Texas in *Binford* v. *Snyder, supra,* expressly held that an absolute deed which contained neither a written expression or any other evidence of any reservation of equitable title passed to the grantee only the legal title; that a trust resulted to the grantor because there was no consideration for the conveyance and no gift intended; and that equitable title remained in the grantor. The words of the Supreme Court appearing in 189 S. W. (2d) at Page 472 are:

> "Therefore, when she conveyed her property to him without consideration and there being no blood relationship existing between them, no intention of making a gift appears. A trust resulted to Mrs. Snyder, and whether the trust be an express or an implied one is immaterial, for the reason that in either class the equitable title to the property is in the actual owner and the legal title is in the trustee. We conclude, therefore, that as between Mrs. Snyder and E. C. Carnes

the equitable fee in the land sought to be recovered in this suit is in Mrs. Snyder."

In *Hamilton* v. *First Nat. Bank of O'Donnell* (T. C. A. 1941), 155 S. W. (2d) 626, 630, the court said:

> "* * * It has long been the established rule of equity in this and many other jurisdictions that where a grantor, without consideration, conveys property to a grantee, under circumstances that do not constitute a gift, a resulting trust arises. Under such circumstances equity presumes an intention of the parties that the beneficial title is to remain in the grantor and the grantee holds the same for his benefit. Solether et al. v. Trinity Fire Ins. Co., 124 Tex. 363, 78 S. W. 2d 180; Jopling v. Caldwell-Dengenhardt, Tex. Civ. App., 292 S. W. 958, reversed on other grounds, Benton Land Co. v. Jopling, Tex. Com. App., 300 S. W. 28; Abilene State Bank v. Donnelly, Tex. Civ. App., 277 S. W. 447; Wise v. Cecil, Tex. Civ. App., 135 S. W. 2d 235."

The same rule of law was expressly followed by the Court of Civil Appeals of Texas at Amarillo in *Shannon* v. *Shannon* (June 26, 1950), 231 S.W. (2d) 986 at Page 989.

The law of Texas is clearly stated by the court in *In re Rosenberg* (D.C., Tex., 1925), 4 F. (2d) 581, 582, speaking through Judge Hutcheson, now Chief Judge for the United States Court of Appeals for the Fifth Circuit, that:

> "* * * Where for any reason the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, equity will imply a trust in favor of the person entitled to the beneficial interest, is settled by overwhelming authority. * * *"

May Kelley Schneider knew that she had given no consideration for the Henderson deeds (Findings 13, 14 & 16, R. 116). She knew that Arthur B. Kelley had not given

his interest in the land to her (Findings 16 & 17, R. 116) and she knew that she had not acquired the interest of her brother, John (Finding 11, R. 115). She knew that she and Arthur held the property as trustees for herself, her brother Arthur, and her brother John. When she found herself in a position where she thought she could appropriate all the land for herself to the exclusion of her brother John, and the widow and devisees of her brother Arthur, except herself, she determined to do so. Shortly after Arthur's death she declared: "I have the deeds to this property and it is mine." (R. 545) and even went so far as to deny that Arthur ever held the property in trust (R. 768, 769, 692-695).

The Circuit Court, though permitting the facts as found by the trial court to stand (R. 901), by its superficial view of the case, by taking the Henderson deeds solely upon their face and by failing to look behind the deeds, as required to do by the law of Texas, has allowed May Kelley Schneider to prevail in her selfish and dishonest scheme, thus making mockery of the law of Texas.

From the above decisions of the courts of Texas it is clear that Conclusion of Law No. 6 (R. 123) of the trial court that no equitable title passed from Arthur B. Kelley to Charles H. Henderson, the conduit, and Conclusion of Law No. 10 (R. 123) that no equitable title passed by the deed from Charles H. Henderson to Arthur B. Kelley and May Kelley Schneider, and Conclusion of Law No. 11 (R. 124) that by the Henderson deeds legal title only became vested in Arthur B. Kelley and May Kelley Schneider as trustees for Arthur B. Kelley, May Kelley Schneider and John M. Kelley, the owners of the equitable title, as tenants in common, is correct, and that the decision of the Circuit Court to the contrary is in conflict with the applicable decisions of the courts of Texas.

Conclusion

We submit that the Court of Appeals for the Fifth Circuit in deciding this controversy did not follow the clear and well-established law of the State of Texas applicable to the ownership of land in Texas and the conveyance thereof, by which it is bound, and that the Petitioners have, by the judgment of the Court of Appeals for the Fifth Circuit, been deprived of land in Texas which belongs to them under the law of Texas.

Prayer

WHEREFORE, Petitioners respectfully pray as in their Petition for Writ of Certiorari.

Respectfully submitted,

OSCAR D. MCCOLLUM,
1337 Rialto Building,
Kansas City, Missouri;
ROY W. CRIMM,
807 Midland Building,
Kansas City, Missouri;
STONE AND STONE,
712 Barfield Building,
Amarillo, Texas,
Attorneys for Petitioners.

D. H. CULTON,
611-618 Barfield Building,
Amarillo, Texas,
Counsel for Petitioners.

Office - Supreme Court, U.
FILED
DEC 4 1950
CHARLES ELMORE CROPLEY

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OCTOBER TERM, 1950

No. 398

HARRY F. MURPHY and EARL J. BOUGHAN, TRUSTEES; MIRIAM HORN KELLEY, a WIDOW; MURIEL KELLEY RISSER, joined Pro Forma by her HUSBAND, FRED P. RISSER: EVELYN TAYLOR KELLEY OWEN, joined Pro Forma by her HUSBAND, ROBERT B. OWEN; JOHN EDGAR KELLEY, a MINOR, by his next FRIEND, ROBERT B. OWEN: and EDNA D. KELLEY, a WIDOW,

Petitioners,

v.

MAY KELLEY SCHNEIDER, a WIDOW,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARMWELL L. COOPER,
ELLISON A. NEEL,
WALLACE SUTHERLAND,
1015 Commerce Building,
Kansas City, Missouri.

WM. Q. BOYCE,
CLAYTON HEARE,
Amarillo Building,
Amarillo, Texas,
Attorneys for Respondent.

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In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 398

HARRY F. MURPHY and EARL J. BOUGHAN, TRUSTEES; MIRIAM HORN KELLEY, a WIDOW; MURIEL KELLEY RISSER, joined Pro Forma by her HUSBAND, FRED P. RISSER: EVELYN TAYLOR KELLEY OWEN, joined Pro Forma by her HUSBAND, ROBERT B. OWEN; JOHN EDGAR KELLEY, a MINOR, by his next FRIEND, ROBERT B. OWEN: and EDNA D. KELLEY, a WIDOW,

Petitioners,

v.

MAY KELLEY SCHNEIDER, a WIDOW,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent submits the following in opposition to the petition for writ of certiorari and in reply to the petitioners' brief in support thereof.

I.
QUESTION PRESENTED

The basic question presented by the petitioners is whether there was consideration for the conveyance by Arthur B. Kelley of his complete title, both legal and equitable, to his one-half interest in the land through the medium and according to the terms of the Henderson deeds; because if (as held by the Court of Appeals) the Henderson transaction shows a legal consideration for the conveyance (by Arthur B. Kelley of his own undivided one-half interest) through the medium of Charles H. Henderson to himself and his sister May Kelley Schneider for the period of their joint lives, with the remainder over to the survivor of them, no question of resulting trust arises and the question posed by the petitioners must fall.

II.
REASONS FOR OPPOSING THE WRIT

1. As a matter of general law, which is also the law of Texas in this instance, there was consideration for the Henderson deeds. In the language of the opinion by the Court of Appeals "the Henderson transaction itself evidences a legal consideration."

Consideration has been defined as "a benefit to the party promising, or a loss or detriment to a party to whom the promise is made." "Benefit" as thus employed, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled, and "detriment" means that the promisee has, in return for the promise, foreborne some legal right which

he otherwise would have been entitled to exercise. *17 C. J. S. 420, Section 70.*

The respondent had a right on March 27, 1937, to require her trustee Arthur B. Kelley to convey to her the legal title to her undivided one-third equitable interest in the lands. In accordance with an agreement with her trustee, she substituted for that right the privilege of becoming a grantee in a deed whereby, through the conduit Henderson, there was conveyed to herself and Arthur for the period of their joint lives, with the remainder to the survivor of them, the title to the land *in complete fulfillment and performance of the agreement.* This was both a detriment and a benefit to May and both a detriment and a benefit to Arthur. This is governed by the general law relating to trusts and by the general law relating to consideration. *12 Am. Jur. 570, Section 79; United States v. Linn, 15 Pet. (U. S.) 290; 10 Law Ed. 742.*

The courts of Texas recognize and follow the general rule. *Jones v. Osbolt, 46 S. W. 2d 422, error refused; Security Drilling Co. v. Rathke Oil Co., 41 S. W. 2d 1019, 1022; Mayfield v. Eubanks, 278 S. W. 243, 246; McGary v. Campbell (Tex. Civ. App.), 245 S. W. 106, 116.* We quote from the *Mayfield v. Eubanks case* as follows:

> "A valuable consideration may be either a benefit to the promisor or a detriment to the promisee, or a surrender by the promisee of some legal right the latter was not otherwise bound to surrender."

Also from the *McGary v. Campbell case:*

> "Valuable consideration, in the sense of law, may consist of some right, interest, profit or benefit ac-

> cruing to one party, or some forbearance, loss or responsibility given, suffered or undertaken by the other. Page on Contracts, Section 514, p. 84; 6 R. C. L. Section 67, p. 654; Keitt v. Gresham (Tex. Civ. App.), 174 S. W. 884."

The question of May's acceptance under the Henderson deed is not raised. Having accepted, she was bound by the provisions of the deed wherein she was named as a grantee.

Quoting from *Greene v. White, 137 Tex. 361, 153 S. W. 2d 575, 583; 136 A. L. R. 626:*

> "The general rule is that the grantee in a deed accepted by him is a party to the deed, even though he does not sign it, and that he is concluded by recitals in the deed and by reservations contained therein in favor of the grantor. Martin v. Roberts, 57 Tex. 564, 568; Orbeck v. Alfei, Tex. Civ. App., 276 S. W. 947; 21 Corpus Juris, p. 1095, Sec. 81; 19 Am. Jur., p. 627, Sec. 29, p. 624, 626.
>
> "The obligations undertaken by the parties to a deed are binding contractually; and where the conveyance is by way of deed poll—that is, one executed by the grantor alone—obligations are enforceable against the grantee by virtue of his acceptance of the deed."

In the *Orbeck case*, cited above by the Supreme Court of Texas, is found the following:

> "When a contract between two parties is reduced to writing and signed by one of them and accepted by the other, it becomes, in contemplation of law, a written contract, and will be so treated by the courts of this state."

The testimony of the respondent was taken (at the instance of the petitioners) by written interrogatories at her home in California (her health not permitting her to be present at the trial) and the testimony of Anne M. Duffy, the Notary, who took the acknowledgments to the deeds and received instructions to send them to record, was taken by deposition at the instance of the petitioners. The Court of Appeals could weigh and construe this written testimony, being as free in that regard as the trial court. Previous to the execution of the deeds Arthur had written a letter to his sister May, the respondent, which is quoted in full in Note 3 to the opinion of the Court of Appeals. (R. 897-898.) The text of the letter is shown in Appendix (1) to this brief.

The Court, in its opinion, also quoted from respondent's testimony. This quotation is set out in the Appendix (2).

Her written testimony was corroborated by the deposition testimony of Anne M. Duffy. (R. 621-623 and R. 624-626.) There was no testimony showing or tending to show that respondent knew of any intent or purpose on the part of her brother Arthur other than expressed in the general warranty deeds themselves. The Court of Appeals held that as a matter of law the deeds were supported by consideration. While the question of consideration is not a local question to be determined by local laws, yet the cited decisions of the Supreme Court of Texas support the holding of the Court of Appeals.

Petitioners cite the case of *Clegg v. Brannan, 111 Tex. 367, 234 S. W. 1076*, and *American Nat. Ins. Co. v. War-*

nock, 131 Tex. 457, 114 S. W. 2d 1161. These are cases where the Texas Statute of Frauds and executory contracts were involved. Petitioners do not here invoke that statute as a ground for their petition.

2. The Court of Appeals held "the form of the transaction effected as to Arthur B. Kelley and May Kelley Schneider a termination of the trust as to them, parties to the transaction."

The execution and consequent termination of the trust required no consideration moving from the beneficiary to the trustee for the beneficiary was entitled (without exaction) to have the trust executed *as directed or consented to by her.* Equity would not countenance a rule that this beneficiary could complain when the conveyance was made as consented to by her, emphasized by the fact that as one of the grantees she accepted the deed. The doctrine of equitable estoppel would be liberally applied. Both the trustee and the beneficiary with full knowledge permitted the matter to rest in unchallenged confirmitory repose for the six intervening years from 1937 when the deeds were executed to 1943 when the trustee died.

Section 342, Restatement of the Law, Trusts, announces the true rule with reference to "conveyance by trustee to or at the direction of the beneficiary." The authority states:

> "(1) Except as stated in Subsection (2) (dealing with inalienable beneficial interests) if there is a sole beneficiary who is not under an incapacity and the trustee transfers the trust property to him or at his direction * * * the trust terminates although the

purposes of the trust have not been fully accomplished."

And in the same Section 342 at Paragraph "b" under "Comment" it is stated:

"If the trustee transfers the trust property to a third person with the consent of the beneficiary who is not under an incapacity, the trust is terminated and the trustee is under no liability for making the transfer."

It is stated in *Lewin on Trusts, 1st Am. from 8th Eng. Ed. by Flint, 684:*

"The cestui que trust may call upon the trustee to execute conveyances of the legal estate as the cestui que trust directs."

In *Moore v. City of Waco, 85 Tex. 206, 211; 20 S. W. 61,* the Texas Supreme Court announced the right of the beneficiary "to call upon the trustee to execute such conveyances of the legal estate as he directs." It follows that the interest of the respondent was included in the Henderson deeds. She consented and accepted and is bound. The supposition brought forward by petitioners as to what would have occurred had May died first assumes a non-production of the facts, but that assumption fails because Arthur, the survivor, could have supplied the facts as his surviving sister has here done, and her heirs or devisees, being bound by her act, would fail. The supposition has no argumentitive value.

3. Consideration for the Henderson deeds being established, no further question is posed by the petition.

III.

ADDITIONAL COMMENT

We deeply regret the statement of petitioners' counsel on page 16 of their brief that "her selfish and dishonest scheme thus makes a mockery of the laws of Texas." It is entirely out of place, however viewed. After proving by their witnesses that Arthur B. Kelley was "a man of character and integrity who would not wrong or cheat or defraud any one knowingly," they, with apparent anger, seek in effect to smear *him* over the shoulders of his adoring and trusting sister regardless of the sentiments entertained by all who knew and exalted him as disclosed by the record. There was no charge in pleading or proof of fraud, accident or mistake. We cannot pass by without protesting the unwarranted reflection upon respondent lady, even though it has no bearing upon the questions involved. For this diversion we crave the indulgence of the court.

IV.

CONCLUSION

Having established that respondent's equitable interest in the lands was conveyed by her trustee as directed, consented to and accepted by her and that there was adequate consideration for the Henderson deeds, it follows:

(a) That the false premise of an existing resulting trust upon which the petitioners bottom their case falls, and

(b) That Article 1288 Revised Civil Statutes of the State of Texas (dealing with instruments of conveyance) is not adversely pertinent or relevant to the controversy.

Justice does not require that the petitioners be relieved of the conclusive effect of the judgment in the Court of Appeals. General law has been correctly applied; no local law has been overturned. Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

ARMWELL L. COOPER,
1015 Commerce Building,
Kansas City, Missouri.

WM. Q. BOYCE,
Amarillo Building,
Amarillo, Texas.

ELLISON A. NEEL,
1015 Commerce Building,
Kansas City, Missouri.

WALLACE SUTHERLAND,
1015 Commerce Building,
Kansas City, Missouri.

CLAYTON HEARE,
Amarillo Building,
Amarillo, Texas,
Attorneys for Respondent.

WM. Q. BOYCE,
Counsel for Respondent.

APPENDIX

(1)

Text of letter from Arthur to May, June 24, 1936. (Note 3, Court of Appeals Opinion, R. 897-898.)

"Dear May:

"Enclosed you will find statement regarding Texas and Kansas lands. All of that property is in my name, deeded to me by mother and father before father went to the hospital in 1918. Brother John, while in financial trouble, released his share to me in consideration of money I had loaned him and his quit claim deed paper is among the mill files. Could you send me the form of deed used in California, whereby the property is in the name of two or more people and transfers itself. I don't know whether such deeds are acceptable in Kansas and Texas. All well here. Hope all well there."

(2)

Quotation by Court of Appeals of respondent's testimony given in response to written interrogatories propounded by petitioners (R. 899-900):

"There were several discussions between Arthur B. Kelley and myself about the conveyances of the Kansas and Texas lands from Arthur to Charles H. Henderson and from Charles H. Henderson to Arthur and myself. These discussions were several days before the date the deeds were signed, which date was on March 27, 1937. Arthur talked with me about having the property conveyed in that way several times before he talked with Charles H. Henderson. Then one day in my presence he told Bert (Charles H. Henderson) the way he wanted the deeds prepared. The deeds which were signed on March 27, 1937 were prepared the way Arthur told Bert to have them prepared. The discussions took place between Arthur and myself, except for Arthur's direction to Bert as to how the deeds were to be drawn. In these discussions my brother

Arthur told me that he wanted to convey the property to Bert and to have Bert convey the property to me and himself (Arthur). Trusteeship was not mentioned. Arthur told me that he wanted to fix it so that when one of us died the one who was still living would own the property. He told me that he had written to me about deeds of that kind a few months before. He told me that if he conveyed the property to Bert and then Bert conveyed it to him (Arthur) and myself, with the right words, if he died first I would own all of the property, and if I died first he would own all the property. He asked me if that was agreeable to me, and I told him it was. I do not remember the exact dates that these conversations took place, except that they took place there at the hospital before the day the deeds were signed. I was there at the hospital a great deal with Arthur. I was there in the room when the deeds were signed."

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DEC 17 1960

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 598

HARRY F. MURPHY and RAINE J. REUSSMAN, Trustees,
MIRIAM HORN KELLEY, a Widow; MURIEL KELLEY
RISSER, joined pro forma by her husband, FRED P. RIS-
SER; EVELYN TAYLOR KELLEY OWEN, joined pro
forma by her husband, ROBERT S. OWEN; and ED-
GAR KELLEY, a minor, by his next friend, ROBERT S.
OWEN; and EDNA H. KELLEY, a Widow,

Petitioners,

vs.

MAY KELLEY SCHNEIDER, A Widow,

Respondent.

ANSWER OF PETITIONERS TO REPLY BRIEF OF RESPONDENT

EDGAR D. [illegible]

[illegible]

Counsel for Petitioners.

ROY W. CULTON,
[illegible]
Amarillo, Texas,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 398

HARRY F. MURPHY and EARL J. BOUGHAN, Trustees; MIRIAM HORN KELLEY, a Widow; MURIEL KELLEY RISSER, joined pro forma by her husband, FRED P. RISSER; EVELYN TAYLOR KELLEY OWEN, joined pro forma by her husband, ROBERT B. OWEN; JOHN EDGAR KELLEY, a minor, by his next friend, ROBERT B. OWEN; and EDNA D. KELLEY, a Widow, *Petitioners,*

vs.

MAY KELLEY SCHNEIDER, A Widow, *Respondent.*

ANSWER OF PETITIONERS TO REPLY BRIEF OF RESPONDENT

To the Honorable Chief Justice and
The Associate Justices of the Supreme Court of
The United States:

Petitioners respectfully submit this Answer to the Reply Brief of Respondent herein.

I.

One of the basic contentions of the Petitioners herein is that there was no consideration for the Henderson deeds. By its Findings of Fact Nos. 13, 14 and 15 (R. 116) the Trial Court, upon the evidence before it,

found that there was no consideration whatever. The Court of Appeals, disregarding the provisions of Article 1288 of the Revised Statutes of Texas, held, as a matter of law, that the deeds on their face showed consideration in the form of a conveyance by May Kelley Schneider to Arthur B. Kelley of her equitable title to the land in controversy.

Respondent, in her Reply Brief (Ps. 3, 5 & 7), asserts in this Court the alleged oral agreement with the trustee, Arthur B. Kelley, under which she says the Henderson deeds were executed and delivered. She asserts (Reply Brief P. 7) "the supposition brought forward by petitioners as to what would have occurred had May died first assumes a non-production of the facts" which Arthur "could have supplied * *". Thus she confesses that the alleged oral agreement asserted by her is a necessary element for her to establish to prevail in this controversy. Respondent by asserting the alleged oral agreement is, of necessity, asserting that the Henderson deeds do not on their face alone carry the equitable title of Respondent and that the question of consideration must be answered by looking beyond the face of the deeds.

Respondent entirely overlooks the fact that, in making Findings of Fact Nos. 13, 14 and 15 (R. 116) that *no consideration whatever* passed from any of the parties to the Henderson deeds to any other party, the Trial Court rejected as untrue the testimony of Respondent relating to the asserted agreement and found as a fact that the asserted agreement had never been made. "* * * The findings of fact by a trial court

must receive such a construction as will uphold, rather than defeat, its judgment. * * *" *Clyde Equipment Co. vs. Fiorito* (C.C.A., 9th) 16 F. (2d) 100.

Respondent also overlooks the fact that the Court of Appeals expressly did not set aside any of the Findings of Fact and that the Findings of Fact stand.

In truth, Respondent ignores Question 1 of the Petition For Writ of Certiorari, thus admitting the correctness of our contentions. Respondent makes no attempt whatever to support the holding of the Court of Appeals that the oral acceptance of the Henderson deed by Respondent was "in legal effect the same as an execution thereof," thus admitting also the correctness of our contentions in Question 2 of the Petition For Writ of Certiorari.

Arthur B. Kelley knew that his brother, John, owned an undivided interest in the equitable title to the land in controversy (Finding No. 10, R 114, 115). The Henderson deeds purported to convey the complete title to all of the property in controversy (Finding No. 12, R 115). Arthur B. Kelley either conveyed the property in trust or he was party to a deliberate scheme to appropriate for himself and Respondent the interest of John M. Kelley in the land. The agreed high character of Arthur B. Kelley is consonant only with a conveyance by him in trust and is entirely inconsistent with the position of the Respondent herein.

The Court of Appeals, by holding that the trustees of John M. Kelley were entitled to his one-sixth interest in the equitable title to the land in controversy (R 897), recognized that the Henderson deeds could

not be enforced in accordance with their terms. From this it seems clear to us that an inquiry into the facts and circumstances surrounding the execution of the deeds is necessary to determine their legal effect.

II

Respondent's contention, on Pages 6 and 7 of her Reply, that her equitable title to the land in controversy was included in the Henderson deeds because of an asserted oral direction to the trustee, is directly in the face of Article 1288 of the Revised Statutes of Texas and of the decision of the Supreme Court of Texas in *Cauble vs. Worsham*, 96 Tex. 86, 70 S.W. 737 There, the father, D. B. Cauble, held title to land as trustee for his daughter, Mrs. Kirkpatrick. The daughter sold the property, receiving from the buyer the sale price and orally requested her father, the trustee holding the legal title, to convey the land to the buyer which he did. Later, the daughter conveyed by quitclaim her interest in the property to another person. It was held that the buyer from the daughter held the superior equitable title as her father, the trustee, could not convey her interest. The Supreme Court of Texas said (70 S.W. at Ps. 738-739):

> "It is provided by article 624, Rev. St. 'no estate of inheritance or freehold' shall be conveyed unless by writing * * *. From this it seems evident that Mrs. Kirkpatrick acquired an estate in the land which could not be conveyed by D. B. Cauble, and which could only be legally conveyed by herself and her husband. *It is urged that because her right was not a legal, but only an equitable, one, she could legally authorize the conveyance of it by*

her father by deed passing his legal title. But no such distinction between conveyances of legal and equitable estate is admissible under our statutes. Masterson vs. Little, 75 Tex. 697, 13 S.W .154; Sprague v. Haines, 68 Tex. 217, 4 S.W. 371. *Since her father could not by his mere deed pass her title, a conveyance by her was necessary, and that conveyance could not consist of her parol agreement* either that she would or that her father might convey * * *." (Emphasis ours.)

CONCLUSION

We respectfully submit that the law of Texas applicable to the ownership of land in Texas and the conveyance thereof is a matter of general and vital concern to all persons owning or acquiring land in Texas; that the decision of the Court of Appeals herein does violance to that law; and that as a precedent the decision is of such general importance that it should be corrected by this Honorable Court.

PRAYER

WHEREFORE, Petitioners pray as in their Petition For Writ of Certiorari.

Respectfully submitted,

OSCAR D. McCOLLUM,
1337 Rialto Building,
Kansas City, Missouri,

ROY W. CRIMM,
807 Midland Building,
Kansas City, Missouri,

STONE AND STONE,
712 Barfield Building,
Amarillo, Texas,
Attorneys for Petitioners.

D. H. CULTON,
611-618 Barfield Building,
Counsel for Petitioners.
Amarillo, Texas,

FILED
DEC 16 1950

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 398.

HARRY F. MURPHY and EARL J. BOUGHAN, Trustees; MIRIAM HORN KELLEY, a Widow; MURIEL KELLEY RISSER, joined pro forma by her husband, FRED P. RISSER; EVELYN TAYLOR KELLEY OWEN, joined pro forma by her husband, ROBERT B. OWEN; JOHN EDGAR KELLEY, a minor, by his next friend, ROBERT B. OWEN; and EDNA D. KELLEY, a Widow,
Petitioners,

vs.

MAY KELLEY SCHNEIDER, a Widow,
Respondent.

REJOINDER OF RESPONDENT TO PETITIONERS' REPLY TO RESPONDENT'S BRIEF.

ARMWELL L. COOPER,
ELLISON A. NEEL,
WALLACE SUTHERLAND,
1015 Commerce Building,
Kansas City, Missouri,

CLAYTON HEARE,
WM. Q. BOYCE,
Amarillo Building,
Amarillo, Texas,
Attorneys for Respondent.

ELLISON A. NEEL,
Counsel for Respondent.

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Supreme Court of the United States

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Petitioners,

vs.

MAY KELLEY SCHNEIDER, a Widow,
Respondent.

REJOINDER OF RESPONDENT TO PETITIONERS' REPLY TO RESPONDENT'S BRIEF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

To the Answer of Petitioners to the Reply Brief of Respondent the Respondent offers the following rejoinder:

I.

Although we realize that this Honorable Court is heavily burdened and that there must be an end to all debates, we feel that our duty to the Court and to our client requires that we analyze and distinguish the case of *Cauble* v. *Worsham,* 96 Tex. 86, 70 S. W. 737, cited by Petitioners.

The fundamental distinction between the *Cauble Case* and the case at bar is that in the *Cauble Case* Mrs. Kirkpatrick was a married woman at the time of the conveyance there involved, whereas Mrs. Schneider was a widow at the time of the execution and delivery of the Henderson deeds in 1937, her husband having died in 1936 (R. 656). We say this distinction is vital under the Texas law because *Article 1299 of Vernon's Annotated Texas Civil Statutes* (which is substantially the same as Article 635 referred to in the *Cauble Case*) requires that the husband and wife shall join in the conveyance of the wife's separate real estate and that no such conveyance shall take effect until the same shall have been acknowledged by the wife privily and apart from her husband and the acknowledgment certified in accordance with Articles 6605 and 6608 of the Texas Statutes. Text of Statutes is set out in the Appendix.

Turning to the *Cauble Case* we find that the property there involved was the separate property of Mrs. Kirkpatrick (page 738 of 70 S. W.). The legal title to the land was vested in Mrs. Kirkpatrick's father, D. B. Cauble. At Mrs. Kirkpatrick's request her father conveyed the land to DeChaumes. Later Mrs. Kirkpatrick and her husband conveyed the land to Columbus Surginer. The title litigation was between the respective claimants under DeChaumes and Surginer. Our Supreme Court held that

the claimant under Surginer had the superior title because *Mrs. Kirkpatrick could convey her separate property only by deed in which she was joined by her husband and acknowledged in the manner required by Texas Statute.* In their quotation from the Court's Opinion the Petitioners have substituted asterisks for the following language appearing in the first sentence of the quotation:

> "and by Article 635 that 'the husband and wife shall join in the conveyance of Real Estate, the separate property of the wife' and that the deed shall be separately acknowledged by the wife."

Asterisks are again used at the end of the quotation, the last sentence having been left dangling. The last sentence of the quotation in full is as follows:

> "Since her father could not, by his mere deed, pass her title, a conveyance by her was necessary, and that conveyance could not consist of her parol agreement either that she would or that her father might convey, for the reason that the statute *requires a particular kind of conveyance to divest her separate real estate.*"

Here the death of Mrs. Schneider's husband removed her disabilities of coverture, and made the deed executed by Arthur, Trustee, holder of the legal title, pursuant to her oral request, binding upon her. *Ashby* v. *Standard Pipeline Company,* (Tex. Civ. App.) 56 S. W. 2d 218, 223, Writ of Error Refused by Texas Supreme Court, wherein the Court says:

> "One who holds an equitable interest in land is bound by a sale of such land by the Trustee at his request, even though such request not be in writing."

Inasmuch as Mrs. Schneider was not under the disability of coverture at the time of the Henderson deeds,

we say that the reasons announced in the *Cauble Case* for holding that the claimant under the Surginer deed had superior title to the claimant under the DeChaumes deed do not apply.

We reiterate, the Court of Appeals has correctly held that the Henderson deeds themselves show a contractual consideration and that the only issue in the case was whether there was consideration for such deeds.

Respectfully submitted,

ARMWELL L. COOPER,
ELLISON A. NEEL,
WALLACE SUTHERLAND,
1015 Commerce Building,
Kansas City, Missouri,

CLAYTON HEARE,
WM. Q. BOYCE,
Amarillo Building,
Amarillo, Texas,
Attorneys for Respondent.

ELLISON A. NEEL,
Counsel for Respondent.

APPENDIX.

Art. 1299—Conveyance of Separate Lands of Wife.

The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded, and certified to in the mode pointed out in articles 6605 and 6608. Acts, 1897, p. 41; G. L., Vol. 10, p. 1095.

Art. 6605. Acknowledgment of married woman.

No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken, unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment on an examination privily and apart from her husband; nor shall he certify to the same, unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it. Acts, 1846, p. 156; P. D. 1003; G. L., Vol. 2, p. 1462.

Art. 6608. Form by a married woman.

The certificate of acknowledgment of a married woman must be substantially in the following form:

"The State of _____,

"County of _____,

"Before me, _____ (here insert the name and character of officer) on this day personally

appeared ....., wife of .....,
known to me (or proved to me on the oath of .....) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said ....., acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

(Seal) "Given under my hand and seal of office this ..... day of ..... A. D., ...

....."